

Vecchio v 40 Pine St. Corp.

2014 NY Slip Op 32913(U)

November 12, 2014

Supreme Court, Suffolk County

Docket Number: 12-3438

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-13-14
ADJ. DATE 7-10-14
Mot. Seq. # 002 - MotD

-----X
ANTHONY VECCHIO,

Plaintiff,

- against -

40 PINE STREET CORP. a/k/a 40 PINE
STREET INC. and LYLE V. PIKE,

Defendants.
-----X

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Upon the following papers numbered 1 to 21 read on this motion for dismissal, etc.; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 19; Replying Affidavits and supporting papers 20 - 21; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendants for an order dismissing this action or, in the alternative, granting summary judgment in their favor is granted to the extent set forth herein, and it otherwise denied; and it is further

ORDERED that counsel for the parties shall appear before this Court at **9:30 a.m. on December 18, 2014** for a preliminary conference.

Plaintiff Anthony Vecchio, a police officer with the Town of Southampton Police Department, allegedly was injured on December 1, 2010, when he tripped and fell from a makeshift step while conducting an investigation at a mobile home. The mobile home allegedly is located on a parcel of property in the Town of Southampton known both as 40 Pine Street, Riverhead and as 40 Pine Street, Riverside. Other mobile homes are located on the same property and allegedly use the same mailing address. The step at issue allegedly was a concrete cinder block situated to allow one to access and exit the mobile home.

Subsequently, in January 2012, plaintiff commenced this action against defendant 40 Pine Street Corp., a/k/a Pine Street Inc., seeking damages for the injuries he allegedly sustained as a result of the fall in December 2010. The first cause of action in the amended complaint alleges defendants are liable for allowing a dangerous condition on the property, and the second cause of action alleges defendants are liable under General Municipal Law § 205-a. The complaint alleges, in part, that plaintiff was injured in a slip and fall accident at premises known as 47 Pine Street, Riverside; that such premises is owned, leased, operated and maintained by 40 Pine Street Corp.; that plaintiff's injuries were caused by a hazardous, trap-like condition on the premises; and that 40 Pine Street Corp. was negligent in, among other things, allowing such condition to exist on the premises and in failing to properly secure the step in front of the trailer "so that plaintiff could perform his labor" at the site. As to every allegation set forth in the complaint, the answer denies "sufficient knowledge or information to know whether the allegation is true or false."

Thereafter, by Order of this Court dated January 17, 2014, plaintiff was granted leave to serve an amended complaint naming Lyle V. Pike as an additional defendant. He also was directed to serve a supplemental summons and amended complaint within 30 days of the entry of such Order. The amended complaint contains the same allegations against both defendants that were asserted in the original complaint against 40 Pine Street Corp., as well as allegations that Pike is the sole shareholder of 40 Pine Street Corp., and that the corporation is dominated by Pike and functions as his alter ego. There is no indication in the record that defendants have served an answer to the amended complaint.

Pike and 40 Pine Street Corp. now move, pursuant to CPLR 3211 (a) (1), for an order dismissing the complaint on the ground documentary evidence establishes they do not own, possess or control the property known as 47 Pine Street, Riverside. Alternatively, defendants seek an order granting summary judgment in their favor on the same basis. Defendants' submissions in support of the motion include copies of the original complaint and answer, the amended complaint, an affidavit of defendant Pike, and a photocopy of a deed transferring ownership of property in Riverhead, Town of Southampton, described using metes and bounds, along with monuments and references to other deeds, from Frank Credidio to 40 Pine Street Inc. Plaintiff opposes the motion, alleging that the accident happened at a mobile home situated on the property known as 40 Pine Street, that all of the mobile homes on the property use the same address, and that the mistake as to the address where the accident occurred was caused by improper information contained in a police investigation report. Plaintiff further asserts that there is no property in Riverside with the address of 47 Pine Street. Included with the opposition papers is an affidavit of plaintiff attesting that his fall in December 2010 occurred at 40 Pine Street.

Dismissal may be granted under CPLR 3211 (a) (1) only if the documentary evidence "utterly refutes plaintiff's factual allegations" and conclusively establishes a defense to the asserted claim as a matter of law (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Shuttle Contr. Corp. v Peikarian*, 108 AD3d 516, 968 NYS2d 179 [2d Dept 2013]). To qualify as "documentary evidence" within the meaning of CPLR 3211 (a) (1), the document presented must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; see *Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). "Judicial records, as well as

documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta v Doe*, 73 AD3d 78, 84-85, 898 NYS2d 569 [internal quotation marks omitted]; see e.g. *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 948 NYS2d 658 [2d Dept 2012]). Affidavits do not constitute documentary evidence within the meaning of CPLR 3211 (a) (1) (*Attias v Costiera*, 120 AD3d 1281, 993 NYS2d 59 [2d Dept 2014]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 948 NYS2d 658; *Flushing Sav. Bank, FSB v Siunykalmi*, 94 AD3d 807, 941 NYS2d 719 [2d Dept 2012]).

Further, when a party moves pursuant to CPLR 3211 (a) (7) for dismissal based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). “However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704, 864 NYS2d 70 [2d Dept 2008]). In assessing whether a complaint can withstand a motion made under CPLR 3211 (a) (7), a court may consider affidavits submitted to remedy pleading defects, thereby preserving “inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). If such evidentiary material is considered by the court, the test is whether plaintiff has a cause of action, not whether he or she has stated one in the complaint (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

Dismissal of the first cause of action under CPLR 3211 (a) (7) is denied, as defendants failed to conclusively demonstrate plaintiff has no common law negligence claim against them for the injuries he allegedly sustained due to the dangerous condition created by the cinder block step (*cf. Coyne v Talleyrand Partners, L.P.*, 22 AD3d 627, 802 NYS2d 513 [2d Dept 2005], *lv denied* 6 NY3d 705, 812 NYS2d 34 [2006]). To be liable for negligence, a defendant must owe a duty of care to the plaintiff (*Eisman v State of New York*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (see *Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; see also *Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2003]). There is no dispute that various mobile homes are located on the property known as 40 Pine Street, that such property is owned by either 40 Pine Street Inc. or 40 Pine Street Corp., and that there is no property in the hamlet of Riverside designated as 47 Pine Street. In fact, the deed presented by defendants states the property conveyed to 40 Pine Street Inc. in April 2005 includes three mobile homes. Furthermore, plaintiff submitted an affidavit attesting to the fact that his fall occurred at a mobile home located on the property known as 40 Pine Street, during work hours, while he was conducting an investigation on an arrest warrant. Defendants’ argument, in effect, that plaintiff should be estopped from claiming his fall occurred at 40 Pine Street, because of the time that has passed since commencement of this action, is

rejected. Here, rather than addressing the allegations in the original complaint concerning its ownership, control and maintenance of property misidentified as 47 Pine Street, Riverside, 40 Pine Street Corp. inappropriately asserted in its answer that it “lacked sufficient knowledge or information” to know whether such allegations were false, contributing to the delay in this action (*see Olsen v Singer Mfr. Co.*, 143 AD 142, 127 NYS 697 [2d Dept 1911]).

Dismissal of the complaint under CPLR 3211 (a) (1) also is denied, as the documentary evidence submitted by defendants failed to conclusively establish their defense as a matter of law (*see Melnicke v Brecher*, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]). The photocopy of the deed, dated April 15, 2005, purportedly transferring ownership of property to 40 Pine Street Inc. is not authenticated and, therefore, not in admissible form. The Court notes the copy of the certificate of acknowledgment submitted by defendants is not in proper form (*see Real Property Law* § 309; *cf. Beshara v Beshara*, 51 AD3d 837, 858 NYS2d 351 [2d Dept 2008]). Moreover, as plaintiff avers in an affidavit in opposition that the accident happened at 40 Pine Street, not 47 Pine Street, the deed fails to establish a defense to plaintiff’s negligence claim as a matter of law.

However, dismissal of the second cause of action for failure to state a viable claim under General Municipal Law § 205-e is granted. General Municipal Law § 205-e creates a statutory cause of action for police officers injured by another person’s failure “to comply with the requirements of any statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all of their departments, divisions and bureaus.” Despite the broad language of the statute, a police officer seeking recovery must demonstrate his or her injury resulted from the defendant’s “noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties,” such as provisions of the Vehicle and Traffic Law and the Penal Law (*Williams v City of New York*, 2 NY3d 352, 364, 779 NYS2d 449 [2004]; *see Gonzalez v Iocovello*, 93 NY2d 539, 693 NYS2d 486 [1999]; *Malsky v Towner*, 196 AD2d 532, 601 NYS2d 310 [2d Dept 1993]). Further, to establish liability under General Municipal Law § 205-a, a police officer must specify the statute or regulation with which the defendant failed to comply, describe the manner in which the injury occurred, and demonstrate a reasonable or practical connection between the statutory or regulatory violation and the claimed injury (*see Williams v City of New York*, 2 NY3d 352, 779 NYS2d 449; *Campbell v City of New York*, 31 AD3d 594, 819 NYS2d 294 [2d Dept 2006]; *Campagna v Arleo*, 25 AD3d 528, 807 NYS2d 629 [2d Dept 2006]).

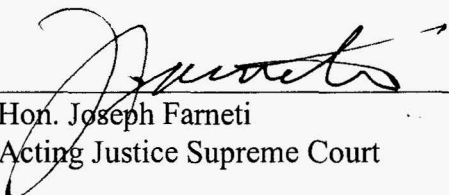
Here, the amended complaint merely alleges defendants “failed to comply with . . . Chapter 123, 123-1 and 261 of the Code of the Town of Southampton.” Section 123-1 of the Southampton Code accepts the New York State Uniform Fire Prevention and Building Code. Chapter 261 of the Code sets forth the maintenance standards for improved properties, the penalties for violating such standards, and the Town’s administrative remedy, namely, to direct the proper agencies to take the actions necessary to bring nonconforming properties into compliance with such standards. A cause of action under General Municipal Law § 205-e may not be predicated upon such general code provisions (*see Williams v City of New York*, 2 NY3d 352, 779 NYS2d 449 [2004]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 59 [2d Dept 2008]; *Link v City of New York*, 34 AD3d 757, 825 NYS2d 518 [2d Dept 2006]). Moreover, the complaint does not specify the causal connection between the alleged

Vecchio v. 40 Pine Street
Index No. 12-3438
Page No. 5

Code violations and the injury to plaintiff (*cf. Abbadessa v City of New York*, 269 AD2d 341, 702 NYS2d 869 [2d Dept], *lv denied* 95 NY2d 755, 712 NYS2d 447 [2000]; *Sciangula v City of New York*, 250 AD2d 833, 673 NYS2d 454 [2d Dept 1998]). Thus, the allegations in the amended complaint fail to state a cause of action under General Municipal Law § 205-e.

Finally, the application for an order granting summary judgment in defendants' favor is denied, without prejudice to renewal.

Dated: November 12, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION